IN THE

United States
Circuit Court of Appeals
For The Ninth Circuit

WILLIAM S. WEST, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 4248.

Brief of Defendant In Error

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FILED ..... Clerk.

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Brief of Defendant In Error

After reading the Brief of the Plaintiff in Error we are constrained to say that not one of the several assignments arise to the dignity of an error. However, assuming for the sake of the argument, that the Court did err in all of the four assignments specified, was there such prejudicial error that the defendant was thereby prevented from having a fair and impartial trial, and which compels this Court to reverse the case.

> RULE STATED: "In order to warrant a reversal it is a well recognized rule that the error complained of must have been prejudicial to the appellant."

2 *R. C. L.*, Sec. 195, page 230, cases cited under Note 16;

17 *C. J.*, Sec. 3600, page 272, cases cited under Note 2;

Myers vs. U. S., 223 F., 919.

We will proceed to further discuss the errors assigned, *seriatim*.

I.

In counsel's First Assignment of Error he stresses the fact that he was deprived of his absolute right to fully cross-examine the witness Simmons.

On page 4, of his Brief, counsel says:

> "The fiirst assignment of error goes to a ruling sustaining objection of the prosecutor to questions asked by the defendant's counsel for the purpose of testing the credibility of the witness. This witness was one who had been employed in the capacity of an informer, or perhaps a little more than an informer. It was his business to visit places suspected of violating the liquor law and secure evidence of such violation and then appear as a witness against the accused party. According to his testimony he had, during his brief stay in Spokane, visited a number of places. He had given testimony as to the persons who were seen by him at the road house conducted by the defendant; and for the purpose of ascertaining how much credit should be attached to his testimony the defendant's counsel asked him the question, *'Now, give me the list of names of the persons that you met at these eight or ten places.'* This question was objected to and

the objection sustained. (Transcript of Record, page 29.)

I cannot help thinking that the trial Court, in making this ruling failed to comprehend the purpose and effect of the question as propounded. Nothing is better settled as a rule of evidence than this: That where a witness testifies to any facts coming to his knowledge during a course of conduct, or during a series of actions on his part, he may for the purpose of testing his reliability be interrogated as to other facts which occurred or came to his knowledge in the same course of conduct or action."

First, let us examine the record. Turning to page 29 of the Transcript, we find the following:

"Question—Now, give me the list of the names of the persons that you met at these eight or ten places—how many places were there?

Answer—I said between eight and ten."

Thus, the record shows that the very thing the counsel complains about never existed, because the question asked was fully answered by the witness.

The examination proceeds:

"Q. Between eight and ten. That must have been (26) nine, then; that is the only number between eight and ten, isn't it? Now, give me the names of the persons that you met at those nine places.

A. If there is any of the cases that are still pending, I would rather not answer.

Q. I do not care what you would rather do, I am asking you a question.

A. Why, there is—

MR. GARVIN. If the Court please, I cannot see the competency of this testimony in reference to all the places he visited during that period of time.

MR. DAVIS. It goes to the credibility of the witness.

THE COURT. The objection is sustained.

MR. DAVIS. Exception."

What then is the question that counsel asked, that was objected to, objection sustained by the Court, and exception taken? Certainly not the question quoted in the Assignment of Error and the Argument (pages 1 and 5, Brief), because, as the record shows, that was fully answered.

If the question which counsel refers to, and about which he is now complaining that the Court erroneously sustained an objection to, is this one:

> *"Now, give me the names of the persons that you met at those nine places."* (Page 29, Transcript of Record.)

Then we say that the question was incompetent, irrelevant and immaterial, and the Court committed no error in sustaining an objection thereto. The question asked of the witness went only to the names of the persons whom witness met or saw in "those nine

places" he visited besides the defendant's. As to who those persons were or their identity could throw no light upon the witness' condition. If it was counsel's purpose by his cross-examination to elicit information which would have advised the jury as to witness' condition at the time he testified of having made the various purchases of liquor at defendant's place of business, the same could have been ascertained by counsel asking questions which would have made that plain. For instance, counsel could have asked the time which these various places were visited with respect to the time that witness testified he purchased the liquor from the defendant, the number of drinks consumed at each place, and the character of the liquor obtained, and what effect the drinking of this quantity of liquor had upon the witness' powers of observation and memory at the time he testified that he visited defendant's place of business. Testimony on these points might have been proper for the jury to determine whether or not the witness could intelligently comprehend what he obtained from the defendant. For instance, if counsel could show from the witness' testimony that at any of the times he visited the defendant's place of business he had consumed such quantities of liquor within close proximity of that time the jury could well find that he must have been so intoxicated as to not be able to clearly recall what took place in the defendant's place of business, and could well reject the testimony of the witness in that regard as unreliable. The identity of the persons

whom witness met at those other "nine places" would not bear upon his credibility. But the condition he was in at the time he went into the defendant's place of business would. It would not make any difference how many persons he had met but the number of drinks he had probably would.

By no stretch of argument or imagination can it be said that it appears from this record that the substantial rights of the defendant have been invaded calling for a reversal.

17 *C. J.*, Sec. 3657, pages 312-313.

Or that counsel has brought himself within the absolute right doctrine of cross-examination.

King vs. U. S., 112 F., 988;

Harrold vs. Oklahoma, 169 F., 47;

Kisner vs. U. S., 231 F., 856;

Kirk vs. U. S., 280 F., 506;

Gallaghan vs. U. S., 299 F., 172.

Even admitting for argument's sake that the Court erred in sustaining the objection to the above question it was not prejudicial.

> "Rulings upon questions asked a witness upon cross-examination, although erroneous, will not necessitate a reversal where no substantial prejudice results therefrom."
>
> 17 *C. J.*, Sec. 3657, page 312, cases cited in Note 44.

But why pursue the argument further? We think we have fully demonstrated to this Court by counsel's own argument and Record that defendant was not deprived of his right to fully cross-examine the witness Simmons on all material and pertinent matters. If defendant suffered any deprivation of that right it was due solely to his own counsel failing to properly pursue the cross-examination, and not to any arbitrary or erroneous ruling of the trial Court.

II.

Overruling the objection to the question propounded by Mr. Garvin (counsel for plaintiff), to the plaintiff's witness Scott (page 8, Brief, Plaintiff in Error), namely:

> *"What were your general duties on those premises?"*

We desire to call attention to the fact that as shown by the record (page 35), that question was never answered by the witness, nor any answer insisted upon by the counsel for the government. There being no answer, certainly there could be no prejudice to the defendant. By his own record there is no merit in this Assignment of Error.

III.

> *"The informer (I assume Counsel means Government witness Simmons), testified that he went out to the road house conducted by the defendant,*

that defendant was not there, but that the witness Scott (alias McKay) sold them liquor." (Page 8, Brief, Plaintiff in Error.)

From counsel's argument he would have it appear that the Government's whole case rested on this one single transaction, which was on the afternoon of June 8th, 1923 (pages 28, 30 and 35, Transcript of Record), that is, that the liquor was sold in defendant's road house by his waiter Scott, alias McKay, in defendant's absence; that there was no evidence of direct sales by or in the presence of defendant.

The record does not sustain this contention. The witness Simmons testified that he first met the defendant at his road house, known as the Cliff House (about five miles west of Spokane), on May 19th, 1923. He went there "accompanied by Agent Pickett, and a lady by name of Maxine Dale, and a taxicab driver and a woman named Pauline Marks." (Page 28, Transcript of Record.) He further testifies as to being out there on later dates, namely, morning of May 20th, night of June 2nd (on this occasion alone), and on afternoon of June 8th. He further testifies that "on each occasion" he purchased liquor from said Scott, alias McKay, the defendant being there on said first occasion, May 19th. (Pages 28-29, Transcript of Record.) Government witness Pickett also testified he "met him (defendant) first on May 19th, 1923," at said Cliff House. Was with Agent Simmons, Maxine Dale, Pauline Marks, and a taxi driver. "We bought Scotch whiskey and Canadian beer, both of

which contained more than one-half of one per cent alcohol in volume." (Page 30, Transcript of Record.) James D. Scott, alias Jerry McKay, also a witness for the government, testified that he was employed by the defendant as a waiter during the months of May and June, 1923, at said Cliff House. "I remember Mr. Simmons and Mr. Pickett being out there. I cannot recall the dates but I remember what they did out there. They did the same as anyone else." (Pages 34-35, Transcript of Record.) The defendant testified in his own behalf. "I live at the Cliff House and have lived in this county for four years. I remember when the two witnesses, Simmons and Pickett came to my place the night of the 19th or early morning of the 20th of May, 1923. There were with them Maxine Dale, Pauline Marks and some taxi driver." (Page 36, Transcript of Record.)

From the above testimony it must be apparent to the Court that counsel is very much mistaken when he says, referring to the sale made by McKay on June 8th, in the absence of the defendant, that "this evidence was received for the purpose of convicting the defendant of guilt and doubtless it was the cause of the defendant being so convicted, * * *." (Page 9, Brief of Plaintiff in Error.) The record conclusively shows that liquor was purchased at defendant's place of business on three separate and different dates prior to said June 8th, and "doubtless it was" that these three separate and different prior occasions when liquor was sold when defendant was present at his

place of business were "the cause of the defendant being so convicted, regardless of the fact that so far as the proof goes he (defendant) had no knowledge of what Scott was doing, had given Scott no instructions, and was not on the premises at the time," namely, on June 8th, which is the only time the evidence shows the defendant was not there when the liquor purchases were made by the government witnesses, Simmons and Pickett. There is also no merit in this Assignment of Error.

IV.

Counsel's fourth and last Assignment of Error is based upon the trial Court overruling an objection to the question propounded on cross-examination to the defendant's witness Maxine Dale:

> *"Q. As a matter of fact, were you not selling drinks up there for fifty cents a drink?"*

This witness had previously testified on direct that she was living at the Louvre Hotel, in Spokane. That the government witnesses, Simmons and Pickett, were at the hotel. That she had drank whisky with them there. That afterwards she and the said witnesses went out to the defendant's place of business. All of this occurred on May 19th, 1923. (Page 39, Transcript of Record.)

On cross-examination she testified:

> "Q. You say you were drinking prior to the time you went out there that night?

A. Yes, sir, we were drinking out of the bottle.

Q. Where was this at?

A. At the Louvre Hotel.

Q. At the Louvre Hotel. That is the hotel that you are in charge of, isn't it?

A. Yes, sir.

Q. And in whose room was this drinking going on?

A. Drinking in the dining room.

Q. In the dining room up there, and the officers, as I understand it, brought this bottle up there?

A. Yes, sir.

Q. As a matter of fact, were you not selling drinks up there for fifty cents a drink?

A. No, sir.

MR. DAVIS. Objected to as immaterial and not proper cross-examination.

THE COURT. Overruled.

MR. GARVIN. Your answer to that is no?

A. No, sir, I did not.

Q. You did not sell either Mr. Pickett or Mr. Simmons any whisky up there?

A. No, sir." (Page 40, Transcript of Record.)

In counsel's brief he states (page 10) that:

> "This question could have but one possible purpose, and that is to discredit the witness by showing that at some other time and place she had herself violated the same law."

The counsel complains that the question was improper cross-examination, and the Court's refusal to sustain an objection thereto, reversal error.

We do not agree with counsel. It is our understanding of the law that:

> "The previous conduct of the witness, his life and associations, whether irreproachable or the reverse, are all relevant. Every person possesses, to a certain extent, the power of selecting his domicile and avocation. So the choice of his business and social connections, the circle of his friends and acquaintances, and his general mode and course of living are largely in his own control. If, therefore, he voluntarily associates with those who are engaged in disreputable pursuits, or if he is addicted to disgraceful or vicious practices, or follows an occupation which is loathsome and vile, though not perhaps criminal, no rule of law prevents such facts from being shown to determine his credibility, by questions put to him upon his cross-examination. And often he may be questioned as to specific facts in his past career which may tend to his disgrace, provided they are not too remote in point of time."
>
> Sec. 387, Underhill's Criminal Evidence, 3rd Ed., p. 554.

Speaking further on this same subject the above author says, beginning at page 553:

> "It is impossible to formulate any general rule by which can be determined the relevancy of questions upon cross-examination. The matter is largely in the judicial discretion. It may with safety be said that the Court ought to interfere whenever necessary to protect the witness from needless insult and contumely, and to forbid impertinent questions which are altogether irrelevent, and have been asked merely to surprise, annoy and confuse the witness, and to cause him to lose his temper. Subject to this limitation the law regards as relevant all facts which tend to illustrate the credibility of the witness or which may enable the jury to determine the weight of his testimony."

Counsel for the government was clearly within his rights and the Court did not abuse its discretion in overruling the objection.

But besides all this, if it can be said that the Court was in error in overruling the objection, again no prejudicial harm has been shown to have been done the defendant, because the record shows that to that question the witness answered, "No, sir." Certainly it cannot be argued that the jury disbelieved the witness and found the defendant guilty because they thought the witness was not telling the truth.

No substantial prejudice resulted to the defendant from this ruling of the Court.

17 *C. J.*, Sec. 3657, page 312.

In conclusion, we desire to say that the record in this case shows that the defendant had a full, fair and impartial trial. He offered himself as a witness

and was given full opportunity to meet the charge against him. And we challenge the counsel to search the record and point out where any of the substantial rights of the defendant were invaded, either by the counsel for the government or the trial Court.

We respectfully submit that upon the record in this case the judgment of the Court should be affirmed.

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